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No. 88-311

In The
Supreme Court of the United States
October Term, 1988

EMPIRE LUMBER COMPANY,

Petitioner,

—against—

WASHINGTON WATER POWER COMPANY,

and

IDAHO PUBLIC UTILITIES COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

PETITIONER EMPIRE LUMBER COMPANY'S REPLY BRIEF

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ARGUMENT

I. Empire's Case Presents a Single, Federal Issue for Resolution by this Court.

It is clear from Respondents' briefs that this dispute turns on a single, federal issue: whether the states are preempted by the Public Utility Regulatory Policies Act of 1978 ("PURPA") from imposing additional qualifying standards on federally qualified facilities before these qualified facilities are entitled to the benefits of PURPA. The Idaho Public Utilities Commission ("Idaho Commission") argues that the Empire case turns on the reasonableness of the Idaho Commission's standards, rules and regulations imposed on federally qualified facilities and concludes that this is not an issue of national importance or significance. (Respondent Idaho Public Utilities Commission's Brief in Opposition, p. 14).

Respondent Washington Water Power also argues that the Idaho Commission has considerable latitude in implementing PURPA, including the imposition of an independent state standard on federally qualified facilities. (Brief for Respondent the Washington Water Power Company in Opposition, pp. 8-9). Washington Water Power then argues that review of the Empire case would be of limited precedential value due to proposed amendments to the Federal Energy Regulatory Commission's ("FERC") regulations concerning the certification process. (Brief for Washington Water Power, p. 9).

Respondent Washington Water Power's arguments seek to confuse the clear rate making authority of each State Commission with the authority to define what is a qualified facility, which authority Congress exclusively

gave to the Federal Energy Regulatory Commission. The Conference Committee, in explanatory preamble, explained why Congress delegated the exclusive authority to define qualified facilities to FERC. The Committee stated:

> The new paragraphs 17(C) and 18(B) of the definitions provide that the Commission [FERC] shall determine, by rule, on a case-by-case basis, or otherwise, that a small power production facility or cogeneration facility is a qualifying small power production facility or a qualifying cogeneration facility, as the case may be. The purpose of this determination is to provide a means to insure that such a facility is *identified through Commission [FERC] action* for purposes of showing that it is in fact included in any exemption under section 210(e) of the Federal Power Act. Such determination would also prevent such facility from being challenged concerning the application of such exemption to it.
>
> The conferees intend, in providing for requirements respecting qualifying facilities to be *established by the Commission [FERC] by rule,* that the Commission [FERC] provide requirements under which a *person may ascertain in advance of construction or operation* of any facility whether or not such facility will meet the *criteria contained in these definitions.*

1978 U.S. Code Cong. & Admin. News 7823 (Emphasis added). There can be no question that the overriding issue of this case is whether Congress left any room to the states to further determine qualified status under PURPA.

It should be noted that the authority of states to determine qualified status under PURPA goes beyond the rate-setting authority of states that was at issue in *Consolidated Edison Company v. Public Service Commission*

of New York, et al., 63 N.Y. 2d 424, 472 N.E. 2d 981 (N.Y. 1984) cert. denied 470 U.S. 1075 (1985). As Justice White recognized in dissent, the denial of the Writ of Certiorari in *Consolidated Edison* left unsettled the authority of states to set avoided cost rates in excess of actual avoided costs. *Consolidated Edison,* 470 U.S. at 107 (dissenting opinion of Justice White joined by Justice Blackmun). Even more unsettling than the *Consolidated Edison* issue of states defining maximum avoided costs is the present federal issue of states defining qualified facilities to deny rights to the benefits of PURPA. Such a determination by each state effectively gives each state the ultimate power to regulate qualified facilities by the state determining whether a project receives PURPA's benefits.

While Respondents acknowledge this single federal issue, both attempt to blur or divert attention from the paramount issue by reference to FERC's proposed national program for certification of qualified facilities. However, there is *no* national program of uniform standards unless each state Commission is preempted from imposing its own qualifying standards before a project is entitled to a contract. Clearly Congress intended rates be set by individual state Commissions, but Congress did not intend to surrender to each state Commission the right to determine when a project is a qualified facility entitled to PURPA benefits. 18 C.F.R. § 292.203.

II. The Success of FERC's National Program Concerning Qualified Facilities Depends on this Court's Resolution of the Single, Federal Issue in this Case.

On March 22, 1988, FERC proposed three new rules concerning a bidding program, independent power pro-

ducers and the administrative determination of avoided costs. 53 Fed. Reg. 9324 (March 22, 1988). FERC proposed the bidding rules in an effort to more accurately determine avoided costs by allowing the market to have more play. In these proposed rules, FERC reaffirms the regulated utilities' federal obligation to offer to purchase energy from qualified facilities. 53 Fed. Reg. 9325.

On April 14, 1988, FERC released its opinion in *Orange and Rockland Utilities, Inc. et al.*, 43 FERC ¶ 61,067, concerning the federal preemption of the states' determination of avoided cost rates. In *Orange & Rockland,* FERC held that PURPA preempted the states from establishing avoided cost rates in excess of the utilities' actually determined PURPA avoided cost.

On August 17, 1988, FERC proposed yet another set of regulations concerning cogeneration and small power producers, 53 Fed. Reg. 31021 (August 17, 1988). This notice of proposed rule making addressed certain problems "with the criteria and procedures under Section 201 of PURPA by which qualifying small power production and cogeneration facilities, i.e., qualifying facilities (QFs), can obtain PURPA benefits." More specifically the proposed regulation addresses self-certification of a qualified facility. FERC states:

> "Apparently, some electric utilities and state regulatory agencies use Commission [FERC] certification as a prerequisite for [QFs] dealing with electric utilities . . . . However, such a requirement is contrary to the Commission's [FERC's] rules. The Commission [FERC] reemphasizes utilities' obligation to offer to interconnect with, purchases from, and sell to self-qualified facilities. Commission [FERC] certifi-

> cation is not necessary to qualify facilities for these PURPA benefits; self-qualification is sufficient." 53 Fed. Reg. at 31025.

All three of the above noted aspects of FERC's "national program", the bidding program, *Orange and Rockland's* avoided costs decision, and the self-qualification rules, depend on a clear determination that PURPA preempts the states from imposing additional criteria for qualification on federally qualified facilities. Without such a determination, FERC's national program is not a national program, but rather an optional state program in which federal regulations and law are subject to final state regulatory approval. While Respondents would prefer vague state regulation defined under the obscure standard "entitlement to a contract", this is totally inconsistent with the above noted Congressional purposes behind PURPA.

The federal bidding program is fatally flawed as a tool for determining actual avoided costs if, as here, the utility may ultimately decide unilaterally based on an additional state standard of "entitlement to a contract" to refuse to offer a contract to the winning bidder. The *Orange and Rockland* decision becomes meaningless if the Idaho Supreme Court's decision determining that PURPA does not preempt the states from regulating qualified facilities remains unmodified.

———o———

CONCLUSION

Empire faces the plight Congress expressly recognized when Congress barred the states from regulating qualified facilities. To have and encourage any meaningful federal program for qualified facilities, Congress sought to preempt the states' ability to define qualified facilities and thereby regulate when a qualified facility is entitled to PURPA's benefits. Accordingly, Empire's Petition must be granted if the states are not to undermine and usurp FERC's national program concerning qualified facilities.

RESPECTFULLY SUBMITTED, this 27th day of September, 1988.

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